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legal interpreters so common? Perhaps it is because they are part of an interpretive community, subject to the same discipline—the same techniques of legal argumentation—that constrains judges. But how great a constraint is that?

This panel wrestles with those and other theoretical questions addressed explicitly or implicitly in various dispute settlement bodies. Concrete cases are used to illuminate the role of politics in international law, and to consider whether and in what ways law stands separate from international politics.

TREATIES—A CINDERELLA STORY

By Duncan B. Hollis[*]

The treaty has become the Cinderella of American jurisprudence—it is the unwanted stepchild of our judiciary. Clearly, U.S. courts have responsibility for treaties. Article III of the U.S. Constitution vests federal judicial power over "all" cases arising under treaties. Article VI defines the "supreme Law of the Land" to comprise not only the Constitution and U.S. laws, but also "all Treaties made, or which shall be made, under the Authority of the United States." And if that is not clear enough, Article VI goes on to direct state court judges to abide by such authority, notwithstanding anything in their states' laws or constitutions.

Such textual clarity aside, U.S. courts are increasingly reluctant to employ the treaty in exercising their judicial function with the same fervor as its two Supremacy Clause siblings—the Constitution and the statute. The Supreme Court's recent decision in *Medellín v. Texas* makes that point starkly. The *Medellín* Court found that none of the three treaties at issue were judicially enforceable since they were not "binding federal law in the absence of implementing legislation."[1] The Court invoked Chief Justice Marshall's *Foster v. Neilson* opinion, bifurcating treaties into two categories and suggesting that courts only apply a treaty when it "operates of itself without the aid of any legislative provision."[2] From *Foster*, U.S. courts have created a doctrine for judging treaties depending on whether they are deemed "self-executing" or "non-self-executing."

But just as her stepmother unfairly judged Cinderella, U.S courts have unfairly judged how treaties should operate in U.S. law. The "self-execution" doctrine is incoherent, inaccurate, and incomplete. *Medellín* does little to redress these deficiencies; at most, the Court sought to remedy the doctrine's incoherence, but its efforts introduced new areas of confusion while continuing to ignore the doctrine's inaccuracy and insufficiency. If anything, *Medellín* demonstrates the need for rethinking how courts approach treaties to better align with the Supremacy Clause's underlying purpose of promoting U.S. treaty compliance.

So, what did *Medellín* do? First, it presented a method for distinguishing self-executing and non-self-executing treaties. For decades, neither lower courts nor academics could agree on what made treaties fall within one category or the other:

- Was it the treaty text—as Marshall's *Foster* opinion suggests—that determines if a treaty operates by itself or requires implementing legislation?
- Was it the U.S. treaty-makers' intent, visible, for example, in Senate resolutions of advice and consent to various human rights treaties?

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[1] 128 S.Ct. 1346, 1357 (2008).

[2] *Id.* at 1356 (citing Foster v. Neilson, 27 U.S. (2 Pet.) 253, 315 (1829)).

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- Or, was it a contextual, multi-factored test, as several circuit courts proposed?[3]

The *Medellín* Court rejected the multi-factored approach, while adopting an ''intentional'' test, mixing elements of the other two methods. The Court looked first and foremost at treaty text, but did so apparently to identify the President and Senate's intent for the treaty's domestic effect.[4] Absent evidence of self-executing intent, *Medellín* reasoned that treaties are non-self-executing. The Court's approach ruled out any presumption of self-execution, and in searching for affirmative evidence of intent, may imply a presumption *against* self-execution. Thus, *Medellín* likely means courts will allocate more existing U.S. treaties into the non-self-executing camp than they might have previously.

This expansion in the number of non-self-executing treaties may have important consequences given the Court's second contribution to the doctrine—delineating what effects flow from labeling a treaty self-executing or non-self-executing. Pre-*Medellín*, three competing views existed on what it meant for a treaty to be non-self-executing:

- Did it mean private litigants could not invoke the treaty as the basis for a cause of action?
- Or, did it mean the treaty was not justiciable in any way?
- Or, more broadly, did it mean the treaty lacked the force of domestic law entirely?

Medellín's Majority appeared to adopt the third view—treaties are ''not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.''[5] Alternatively, one could read the Court's opinion more narrowly to support the second, ''non-justiciable'' position by interpreting references to ''domestic law'' as short-hand for ''judicially enforceable'' domestic law. Thus, although *Medellín* teaches that non-self-execution does more than deny private rights of action, it creates new confusion over what it means to say non-self-executing treaties do not qualify as ''domestic law.''

But even if we view *Medellín* as improving the self-executing doctrine's coherence, the Court did nothing to redress the doctrine's inaccurate and incomplete image of U.S. treaty law and practice. The doctrine contemplates only two potential domestic effects for U.S. treaties—either a treaty is self-executing and speaks to courts just like a statute, or it is non-self-executing and speaks to Congress, leaving judicial consideration of the treaty to await future legislative action. Most judicial (and academic) discussions of non-self-executing treaties assume they bind the United States internationally to unenforceable obligations where Congress has yet to act (thus risking U.S. non-compliance). Such characterizations are clearly inaccurate. In reality, the U.S. government has a policy and practice of not joining a treaty until it has determined U.S. domestic law comports with whatever international law obligations the treaty imposes.

Simply put, the Executive does not believe in joining treaties until whatever execution into U.S. law it believes is necessary has occurred. The Executive does this in one of four ways. First, the Executive may conclude that U.S. courts should directly enforce a treaty to preserve U.S. compliance, either at the behest of the Executive or even private individuals. Second, the Executive may view itself as having sufficient Executive powers—e.g., as

[3] *See, e.g.,* Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985); People of Saipan v. U.S. Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974).

[4] *See Medellín*, 126 S.Ct. at 1364, 1366. The Court also utilized negotiating history as well as post-ratification understandings of other nations.

[5] *Id.* at 1356 (quoting Igarta-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005)).

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Commander-in-Chief—to prevent the United States from running afoul of a treaty's obligations. Third, the Executive may decide that although the treaty "speaks" to the legislature, *existing* statutes (or the Constitution itself) satisfy the treaty's requirements—although not without controversy, the Executive premised its adherence to human rights treaties like the International Covenant on Civil and Political Rights (ICCPR) on such grounds. Fourth, the Executive may conclude a treaty requires additional legislation. But—and courts and academics largely ignore this—the Executive almost always waits for Congress to enact that legislation *before* joining the treaty. For example, even though the Senate gave advice and consent to ratification of the Basel Convention on Hazardous Wastes in 1992, the President has withheld U.S. ratification because Congress has still not enacted the statutes necessary for U.S. compliance.

The Senate takes a similar approach. It may condition its advice and consent on the enactment of legislation, as it did with the Genocide Convention. Or, the Senate may concur with the Executive that existing federal (or state) law suffices for U.S. compliance as it did with the Cybercrime and Transnational Organized Crime Conventions.

These policies and practices present a remarkably different vision of a treaty's potential domestic effect than that offered by the self-execution doctrine. When courts suggest treaty-makers can only intend a treaty to either have direct effect or require subsequent legislation, they fail to accommodate alternative methods for the treaty's implementation, namely existing law or Executive power. The doctrine's inaccuracy on such a fundamental point begs for its reconsideration.

In addition to being inaccurate, the self-execution doctrine is incomplete in two respects—one descriptive and another more normative. Descriptively, its focus on Article II treaty commitments addresses a shrinking category. Alternative methods—congressional-executive and sole-executive agreements—have long existed to bind the United States under international law. Those methods, moreover, are increasingly dominant; over the last twenty years, less than 7 percent of U.S. international agreements have utilized the Article II process. Self-execution, however, has nothing to say about how these other commitments operate in U.S. law, and therefore it fails to provide a comprehensive method for judging U.S. treaties.

But even if we confined our analysis to Article II treaties, the current doctrine remains normatively incomplete. It assumes judging treaties requires statutory equivalence; i.e., courts should only apply treaties where they afford rights or remedies in the same manner as statutes. That model, however, fails to account for why the Framers included treaties in the Supremacy Clause in the first place. Even as they debated the allocation of the treaty power, the Framers were unanimous on the need for a system that ensured U.S. treaty compliance. Indeed, the states' violation of U.S. treaty commitments served as a key motivation for drafting the Constitution itself.

To the extent this compliance concern remains salient—and the Executive and Senate's practice suggests it is—it argues for a different judicial role; one focused not only on asking if treaties operate like statutes, but also how judicial action (or inaction) impacts U.S. treaty compliance. Courts should not simply inquire if a treaty has *any* intended domestic effect, but ask specifically *what kind* of domestic effect the treaty-makers expected to ensure U.S. treaty compliance. Based on that understanding, courts should, whenever possible, interpret U.S. law to avoid the treaty's breach. Rather than a treaty's status, therefore, courts would ultimately focus on how U.S. laws (both new and preexisting) accommodate a treaty's

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requirements; a job for which the judiciary appears well suited given its duty—as Chief Justice Roberts recently recalled—to say what the law is.[6]

Where would such an approach take us? Would it get our Cinderella off to the proverbial ball? For starters, if the treaty-makers foresaw a direct judicial role, the answer appears easy—*Medellín* affirms that if a treaty (or treaty-makers) intended U.S. courts to do something, the Supremacy Clause affords them the authority to do so. But what if the treaty-makers did not envision compliance occurring directly via judicial enforcement, but through some other method such as legislation or regulations? Does that mean courts can—as they often currently do—ignore the treaty because of its non-self-executing status?

It turns out the treaty's Cinderella story has its own Prince Charming, who denies treaties must face such judicial irrelevance. Even if courts do not directly enforce a treaty because its text (or the treaty-makers) contemplated compliance through legislation, the *Charming Betsy* canon gives that treaty continued relevance.[7] That canon has courts read statutes to be consistent with U.S. international obligations whenever possible. Although originally conceived to assess legislative intent with respect to customary international law, the doctrine can apply with equal force to ensure U.S. statutes comport with U.S. treaty obligations. So, instead of refusing to analyze allegations of ICCPR violations because of its non-self-executing status, a court should assess those allegations—not through the treaty directly—but through the statutory (and constitutional) mechanisms the United States understood would ensure compliance with the ICCPR provision purportedly violated. In other words, courts can (and should) interpret the laws on which the President and the Senate understood treaty compliance to depend consistent with the treaty itself.

Using *Charming Betsy* for non-self-executing treaties comports with the original rationale for including treaties in the Supremacy Clause—i.e., treaty compliance. It also respects the Supremacy Clause's actual text by giving domestic legal effect to all treaties, even if not always directly, at least through interpretations of new and pre-existing statutes. Moreover, the canon can apply to all U.S. treaties, including the congressional-executive and sole-executive agreements that now often bind the United States in lieu of Article II treaties.

The Court, moreover, has already implicitly approved of this approach in *Hamdan v. Rumsfeld*.[8] In *Hamdan*, the Court did not rely on the Geneva Conventions' status as non-self-executing treaties to find it lacked authority to consider allegations that U.S. military commissions violated those treaties. Instead, the Court found that even if the Geneva Conventions did not have direct effect in U.S. law, the Uniform Code of Military Justice incorporated them into U.S. law, thereby requiring the Court to judge whether the U.S. commissions complied with those treaties. Although the Court did not cite *Charming Betsy*, the *Hamdan* decision demonstrates how U.S. courts can still judge non-self-executing treaty provisions, particularly where failing to do so would put the United States in breach of its treaty obligations as the Court understands them.

In conclusion, I am suggesting a theory of *Charming* Treaties. Unlike the current self-execution doctrine, a *Charming* Treaties model would accurately account for the role of all three branches in giving effect to treaties in U.S. law, while accommodating more completely the compliance concerns that motivated those roles in the first place. Courts would have to do more than bifurcate treaties into two categories by considering explicitly how their

[6] Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2672 (2006) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[7] Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[8] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

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decisions impact U.S. treaty compliance. In particular, I would expect courts to reflect on the political branches' views on what domestic effects a treaty required in determining their own role of saying what the law is. Non-self-executing treaties would thus remain relevant to courts as an interpretative tool for assessing the proper scope of statutory and regulatory rules on which U.S. treaty compliance depends. Greater judicial oversight of U.S. treaty commitments would, in turn, incentivize the Executive and the Senate to provide more detailed explanations of how they interpret treaty requirements, and, just as importantly, what authorities—legislative or otherwise—they envision ensuring U.S. treaty compliance. Such information will be all the more important post-*Medellín*, where the Court has signaled that the Executive and the Senate must be explicit if they intend a treaty to enforce itself. Adopting a *Charming* Treaties model could thus ensure that the vagaries and problems of self-execution do not prevent the treaty from living in U.S. law—if the reader can forgive one last fairy tale analogy—like Cinderella did: happily ever after.

HYPER-INTERPRETATION: PROMISE OR PERIL?

By David S. Berry[*]

I. INTRODUCTION[1]

In the field of treaty interpretation, the choice of a particular interpretive theory may simultaneously involve a choice in the wider forum of international politics. At the simplest level, the choice of one method of interpretation over another—for example, the textual method over the teleological method—may determine the result in a particular case. At the broader level, interpretive strategies may signal more far-reaching, non-legal choices and goals. This is particularly the case with strategies that push the boundaries of interpretation, or as I will suggest, go so far as to breach the general rules of treaty interpretation. Particularly in the fields of law of international organizations and human rights law, recent innovative treaty interpretation practices give rise to this latter possibility, raising interesting questions about the role of interpretation itself.

In addressing these issues we must first ask ourselves a threshold question: is it possible to fundamentally or materially breach the rules of treaty interpretation? This may sound like a strange question. But if we accept that a defined body of rules of treaty interpretation exists, one that is coherent, determinate and globally applicable, then those rules should be capable of breach, just like any other legal rules. By using the term ''globally applicable,'' I assume that there is one general body of international law governing treaty interpretation rather than a number of sub-sets of discrete or even mutually exclusive interpretive rules applicable to different fields of international law.

To provide an example, a breach of the rules of treaty interpretation could arise in a situation where a judge fabricates and then upholds the ''purpose'' of a treaty, despite the clear and contradictory evidence of both the intention of the drafters and the treaty text itself. Such interpretive breaches may be identified in decisions of international courts and tribunals, particularly in the area of human rights law, where a new, problematic form of ''interpretation,'' one unconstrained by the treaty text, intention or textually-derived purpose may be developing. I would call this practice ''hyper-interpretation,'' although it could also be

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